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CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 20.

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

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ARGUMENT:

I—The exception of damage from fire in the first section of the Limitation Act of 1851 is inapplicable to damage which results inevitably from unseaworthiness and from carelessness in the loading port (while the vessel is still under the control of the shipowner's managing agent in that port) in preparing the vessel for sea to make her ordinarily safe against outbreak of fire. Especially so if the dangerous condition is observable by even an unskilled person and has, in fact, been discovered and reported by several such unskilled persons, longshoremen, who, however, had no authority from respondent to incur the expense of remedying the unseaworthy condition 16

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Moreover, so far at least as concerns the use of ordinary care in the loading port in pre-

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paring a vessel for sea to protect her against outbreak of fire during the voyage, Congress did not intend, by granting in the Limitation Act of 1851 certain exemptions against loss by fire, to give preferential treatment or immunity to a common carrier which, although it has issued bills of lading under its corporate name, commits or delegates its entire personal duty in the loading port under an express warranty of seaworthiness to a managing agent and a vessel officer there, as against a shipowner whose regular corporate officers perform that duty themselves or actively supervise its performance, and who are interested enough to observe personally the conditions existing on board the vessel before they order her to proceed to sea with the cargo. Such a preference would put a premium on carelessness in management and in preparation for the voyage, and on ships' managers keeping themselves in ignorance of observable dangerous conditions..... 45

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tion by an independent clause in some of the bills of lading, therefore, has no legal effect whatever as to those contracts so far as a suit in the United States is concerned unless the facts are such that in the absence of such clause the Fire Statute would be applicable. The purpose of the insertion of that clause incorporating the Fire Statute is to enable the shipowner to have it read as part of the contract (if applicable) in the event suit is brought on the bill of lading in a foreign country. The Fire Statute does not deal with or even mention loss from unseaworthiness..... 47

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The respondent was doing business in the loading port as a common carrier under its corporate name. Its regular corporate officers at Hull personally participated in and approved by cables and correspondence the booking of this cargo, the fixing of the rates of freight, and the issuing of the bills of lading to these petitioners. Furthermore, the contracts evidenced by the forms of bills of lading covering most of the cargo were entered into in its name through its New York managing agent..... 62

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IN THE

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ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinions below are officially reported as *Earle & Stoddart* v. *Ellerman's Wilson Line,* 45 Fed. (2d) 231, S. D. N. Y. (R. 582); and *Earle & Stoddart* v. *Ellerman's Wilson Line,* 54 Fed. (2d) 913, C. C. A. 2 (R. 641).

Jurisdiction of This Court.

A petition for writ of certiorari was filed March 19, 1932 (R. 648), and was granted by order of this Court entered April 18, 1932 (R. 648).

The jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347), and under Article 3, Section 2, Clause 1, Constitution of the United States.

Statement of the Case.

This is a libel in admiralty by owners of cargo against a shipowner who was a common carrier for breach of the contract of affreightment (R. 3). The breach alleged is the failure of the shipowner to deliver the cargo at destination (R. 24). The cargo was shipped in good condition at New York on the Steamship "Galileo" on August 27, 1926 (R. 31) and was to be carried to Hull, England, and be delivered there in like good condition (R. 24, 30A, 555). The shipowner, admitting its failure to deliver the cargo at destination, pleaded three defenses. The first defense was that "The said vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52, paragraph "Tenth" of Answer), and that the Fire Statute (Section 4282, R. S.) exempted it from liability because an outbreak of fire on the vessel caused loss of the cargo (R. 52). There is no allegation that the outbreak of fire was without the personal design or neglect of the shipowner, excepting the bald allegation that "The vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52). The second defense was that a clause in the bill of lading exempted it from liability for loss of cargo from outbreak of fire (R. 53). The third defense was that the amount of respondent's liability for the loss of the cargo should be limited to the value of the goods as computed according to the bill of lading valuation clause. At the trial, the respondent offered no evidence to support its allegation that the vessel was "seaworthy, properly equipped, manned and supplied" (R. 52), so far as danger from outbreak of fire was concerned. On the contrary, without ever amending its pleading, the respondent itself introduced evidence that the vessel supplied at the loading port—New York—was unseaworthy on sailing because it contained an easily-discoverable and very dangerous fire hazard; that ordinary care had not been taken before sailing

to make the vessel safe so far as outbreak of fire was concerned, and that the vessel was, therefore, unfit to proceed to sea, and that all the loss of cargo sued for resulted inevitably within six hours after sailing from a fire caused by that dangerous condition. The hazard consisted of coal which was in such a high state of progressive heating and oxidation that it burned the boots of the coal trimmers and made normal coal trimming impossible, and gave off such a strong odor of coal gas that it was observed on a coal-boat alongside the vessel (R. 329, 330, 331, 642).

The respondent is a British corporation, having its general office at Hull, England. It was doing business at New York as a common carrier under its corporate name through a subsidiary or managing agent (Ellerman's Wilson Line, New York, Inc.) which obtained cargo from shippers and entered into contracts of affreightment there on its behalf (R. 335, 343, 344, 351). The record fails to show that respondent issued any instructions to Ellerman's Wilson Line, New York, Inc., to see to it that the vessel should not be permitted to sail when she was in an unseaworthy and dangerous condition. Consequently, although the unseaworthiness was observable even by unskilled persons, both the respondent and its New York agent permitted the vessel to sail without being interested enough even to go on board her to look her over, and without making any examination whatever of the 'tween deck compartment in which the obviously dangerous fire condition existed.

Before sailing, the dangerous condition had, however, been observed and protested against by the stevedore, Magarelli, and by several shore coal trimmers who had been employed by respondent's shore agents at New York to load an additional 850 tons of coal (R. 329-330, 307) which the managing officers of the respondent at Hull had ordered by cable be carried on the "Galileo" for use at destination as bunkers on another of respondent's vessels (R. 346, 572). A large part of this excess coal was loaded in the 'tween

deck compartment as cargo on top of the "very hot" old coal. The chief engineer of the vessel, to whom the protest was made, did nothing to remedy the danger (R. 307-308). He testified (R. 316):

> "Q. He (the stevedore Magarelli) came to you and told you that the coal was hot to his feet, and you brushed him aside and told him to go about his business, I have no time to pay attention to you? Is that what happened? A. Yes, sir."

Respondent's chief shore agent at New York, Mr. Sanderson (the President of Ellerman's Wilson Line, New York, Inc.) died before trial without testifying (R. 336). Only one of the other officers of respondent's New York subsidiary or agent was called as a witness, and he testified that he did not even visit the vessel while in the loading port (New York) to see whether it was in safe condition to carry the cargo which the New York agent, on respondent's behalf, was contracting to carry. No one else took precautions before sailing to prevent outbreak of fire during the voyage. Mr. Georgi, Vice President of Ellerman's Wilson Line, New York, Inc. (R. 347) was not even called as a witness, notwithstanding the fact that he swore in verifying the answer as follows (R. 53): The "Galileo" "sailed from the port of New York bound for the port of Hull, England. The said vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52).

On August 28, 1926, "At 12:50 P. M. the anchor was weighed and the vessel proceeded to sea" (R. 59). "At 4:35 P. M." on August 28, 1926 (R. 59), within six hours after leaving New York and while "The 'Galileo' was proceeding to sea and was in the neighborhood of Fire Island Light Vessel" (R. 56), the progressive heating of the coal reached the ignition point, and the flame became uncontrollable without help from shore (R. 62). The "Galileo" turned about and returned to New York (R. 62) and shortly afterwards, while water was being pumped in to

extinguish the fire, sank (R. 63) and, together with her cargo, became a total loss (R. 63).

Concurrent Findings Below:

The District Court:

"The libellants contend that not only was the ship not seaworthy when she commenced the voyage, but that respondent had not exercised due care to make her so, and that therefore the respondent is liable for the loss of the cargo; while the respondent relies on the defense of the Fire Statute (U. S. C. A., Title 46, Sects. 182, 187" (R. 582).

"There remains for consideration the question whether respondent is liable on account of the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal. Libellants claim that respondent failed in a non-delegable duty to have reasonable care exercised to make the vessel seaworthy before her departure. *Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours"* (R. 587). (Italics ours.)

> [The respondent admitted in its answer that "all the loss and damage" sued for was caused by such bunker fire (R. 52).]

"Libellant's contention that respondent is liable for the loss even though it was caused solely by the negligence of the chief engineer is based on the theory that *respondent was under a contractual obligation to the shippers that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port.* It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer caused a breach of contract on the part of the owner" (R. 590). (Italics ours.)

"Libellants construe the statute to mean that *the exemption is granted only upon condition that the owner's general maritime obligation in regard to the seaworthiness of the vessel at the commencement of the voyage be fulfilled to the extent of having due care exercised by all connected with it,* whether the owners, representatives or the ship's officers; in other words, that the distinction which the statute makes between the owner's neglect and the ship officers' negligence has no application to matters affecting the seaworthiness of the vessel at the commencement of the voyage" (R. 590). (Italics ours.)

The Circuit Court of Appeals:

"The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9), the 'Galileo' was unseaworthy when she sailed, and this was due to her chief engineer's negligence" (R. 642).

These findings rest upon the testimony of respondent's own witnesses. The negligence of the Chief Engineer at the loading port, to which the courts below refer (R. 588, 642, 643), consisted in failing to heed warnings from the stevedore and coal trimmers that the coal already in the bunker was "very hot", and in failing to prevent the continuance of the dangerous condition then existing and being aggravated by the work which the shore stevedores employed by the respondent's New York managing agent were doing in loading the new lot of respondent's coal on top of the very hot coal already in the bunker (R. 642). The respondent's managing officers in England had peremptorily ordered that the new lot of coal be loaded as bunkers for use on another vessel of the owners after arrival at

destination (R. 325). The unseaworthiness found by the courts below to exist at the time of sailing, could only be remedied by the employment of additional longshoremen to assist in shifting "250 to 300 tons of coal" to get at the seat of the dangerous condition which existed on the "Galileo" at the time she sailed (R. 62).

The defense, sustained by the Circuit Court of Appeals, was that, as a matter of law, on these undisputed facts, the shipowner was exonerated from all liability because of the so-called Fire Statute, one of the provisions of the Act of Congress of March 3, 1851, commonly referred to as The Shipowners' Limitation of Liability Statute. The language of this provision, U. S. Code, Title 46, Section 182 (R. S. 4282; Act of March 3, 1851, c. 43, Sec. 1; 9 Stats. at L. 635) is as follows:

> "Sec. 182. Loss by Fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

[See Appendix A of this brief for full text of statutes involved.]

The courts below held in effect that Congress by that Act intended to modify, and did modify, in so far as fire is concerned, the duty of a shipowner to supply a vessel which at the time of sailing from the loading port is seaworthy. The courts further held in effect that a shipowner might, without subjecting himself to any liability, permit his vessel to sail from her loading port with a dangerous fire hazard within her, although the hazard could not be remedied by the crew at sea after sailing, and although such hazard was observable before sailing, even by unskilled persons. The

Court disregarded the warranty of seaworthiness which is included in every contract of affreightment (*The Edwin I. Morrison,* 153 U. S. 199 *The Caledonia,* 157 U. S. 124), and disregarded the circumstance that there had been a breach of that warranty even as it was modified by the provision in the bill of lading limiting the shipowners' liability for unseaworthiness to the duty to use due diligence to make the steamer seaworthy. The provision of the bill of lading containing this modification is as follows:

> "The carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default * * * by fire or flood, from any cause or wheresoever occurring; * * * or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners* have exercised *due diligence to make the steamer seaworthy.*" (Italics ours.) (R. 30A.)*

[See Appendix B of this brief for full text of pertinent bill of lading clauses taken from Exhibit A (R. 30A) annexed to the libel, which bill of lading was used for most of the cargo.]

The court refused to follow a contrary ruling in *The Etna Maru,* 20 Fed. (2d) 143 (Dist. Texas) on the ground

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*The above quoted clause is taken from the form of bill of lading Exhibit A (R. 30A) and appears substantially in the same language in all of the bills of lading involved in this case.

In addition to that clause, the bills of lading in the forms Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C) and Exhibit Q (R. 46C) contain the following clause:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels', etc. and to Sections 4281 and 4287, each inclusive, of the United States Statutes" (R. 30A).

Ten of the bills of lading, Exhibit B (R. 32A), Exhibit E (R. 34B), Exhibit I (R. 38C), Exhibit H (R. 38A) Exhibit J (R. 40A), Exhibit K (R. 40C), Exhibit L (R. 42A), Exhibit M (R. 42B), Exhibit N (R. 44A), Exhibit O (R. 44B) and Exhibit R (R. 48A), contained a clause reading as follows:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States" (See Point I-A, at p. 47 of this brief).

that that decision had been affirmed in *The Etna Maru*, 33 Fed. (2d) 232 (C. C. A. 5) on "another ground"; but the court does not state what it believed such other ground was, and an examination of those opinions and of the Record in that case shows that no such other ground exists (see p. 18 of this brief). The court also specifically declined to regard as controlling this court's statement in *The Malcolm Baxter, Jr.*, 277 U. S. 323, that a shipowner has not brought himself within Section 3 of the Limitation Act of 1851 if the only damages sued for or established by the evidence result from failure to use due diligence to make the vessel seaworthy.

The following, more extended statement of the facts, is based entirely on respondent's own uncontradicted evidence. In August, 1926, the respondent, through its New York agents, Ellerman's Wilson Line, New York, Inc., 26 Broadway, New York City, whose stock was entirely owned by the respondent (R. 343), held itself out at New York by advertising in the papers as a common carrier of goods on its steamship "Galileo" from the port of New York to the port of Hull, England (R. 335). It admittedly endeavored to "book all the cargo we can for her and we get it alongside the steamer" (R. 335). The bills of lading, as a matter of usual practice, were issued and signed by the Ellerman's Wilson Line, Ltd. by Ellerman's Wilson Line, Inc., the New York subsidiary, as agent (R. 336, 344, 343, 347).

On August 27, 1926, various persons, the petitioners here, shipped goods on board the "Galileo", then at the port of New York, and received therefor negotiable bills of lading (R. 30A to 48B inclusive). The bills of lading in

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(Footnote continued from bottom of page 8.)

Two other bills of lading, Exhibit C (R. 32B) and Exhibit D (R. 34A), contained a clause reading as follows:

> "The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States."

One other bill of lading, Exhibit P (R. 46A) contains a clause which merely incorporates the Harter Act.

the form Exhibit A annexed to the libel were signed by the respondent as follows:

> "Ellerman's Wilson Line, Limited, By Ellerman's Wilson Line, New York, Inc., as Agents" (R. 30A).

The remainder of the bills of lading were signed by persons admittedly duly authorized by the Ellerman's Wilson Line, Ltd. to sign such bills of lading (R. 23, 24, 51, 555). The managing officers of the respondent at Hull personally arranged by cable for the booking of the cargo and the terms to be agreed upon with the shippers (R. 350, 351 and 352). All of the bills of lading acknowledge receipt of the goods in apparent good order and condition, and promise that the goods will be transported by the good steamship "Galileo" and will be delivered in like good order and condition at the port of Hull (R. 30A to 48B).

Before the "Galileo" sailed from New York, a cable was received by the respondent's New York agent from the respondent itself at Hull, peremptorily directing that 850 tons of coal belonging to the respondent be also loaded on the "Galileo" as bunkers for use on another of respondent's vessels, the "Francisco", to which the coal would be transferred after arrival at Hull (R. 346). The cable read as follows (R. 572, 572A):

> "HULL 9 August 20, 1926
> LCO WILSONLYN NY
>
> 'GALILEO' LOAD EIGHTFIFTY BUNKERS TRANSFERENCE 'FRANCISCO'."

The respondent's New York agents employed stevedores, the Jarka Company of New York, to load the coal (R. 345). Magarelli was the foreman stevedore of the Jarka Company (R. 328), and he proceeded to the "Galileo" with a gang of coal trimmers (R. 329). When the trimmers went into the bunkers on the "Galileo", they discovered that the old bunker coal left over from the previous voyage was so very

hot that it burned their boots and made one of the trimmers so sick that he "fell out" (R. 329). The heat and gas in the bunkers were so bad that none of the trimmers could work for more than 10 or 15 minutes at a time (R. 330). The trimmers protested to Magarelli that "they can't work no more" and "started to kick and holler, it was too warm down there", "The coal, it is too warm" (R. 329). Magarelli, while on the coal boat alongside the "Galileo", could "smell the gas over the side, there was gas come on the coal boat" (R. 331). Magarelli, after receiving the protest, went down in the hatch himself and found that the coal was too warm, and that the men could stay there only ten or fifteen minutes to work (R. 330). Thereupon, Magarelli immediately protested to a man named Oxtoby, the Chief Engineer of the "Galileo", who was on board the "Galileo" and said: "The coal is very hot" (R. 330)—the coal that is already in the bunkers (R. 331). "Chief, my men be kicking there down below, it is warm, and they can't stay down below" (R. 330). But the Chief Engineer paid no attention to Magarelli's protest (R. 330), and the trimmers "went on loading the coal" (R. 331).

Oxtoby, the Chief Engineer of the "Galileo", testified that before the "Galileo" sailed from New York, Magarelli, "the foreman, came to me" (R. 307)—"The foreman of the coal trimmers, and he said that the coal was hot" (R. 307), and "He said it was burning the men's boots" (R. 307). Oxtoby ignored the protest (R. 316), and "brushed him aside and told him to go about his business" (R. 316).

Within six hours after the "Galileo" sailed from New York (R. 59), bound for Hull, the heating reached the ignition point, and fire broke out in the coal in the compartment where Magarelli's men had been working (R. 59). The fire was so serious that after a consultation of officers, and without waiting for a reply to an urgent wireless message from the Master to the agents of the "Galileo", Ellerman's Wilson Line, Inc., at New York, informing the

Line of the fire and suggesting return to port and discharging or shifting of coal, it was decided to proceed back to New York, where assistance could be obtained to shift the coal to get at the seat of the fire (R. 62). To get at the seat of the fire required shifting of 250 to 300 tons of coal (R. 62).* After reaching New York, and while water was being pumped in in an effort to extinguish the fire, the "Galileo" capsized, causing her and her cargo to become a total loss (R. 63).

Without questioning the facts in any way, we think it significant to observe the manner in which they were presented. The shipowner first pleaded that the ship was seaworthy. When it became clear that this burden could not be sustained, the chief engineer of the vessel, a "sea servant", was brought in and assumed full responsibility, although that involved an admission by him that his previous statement was false (R. 326). By this means the shipowner, while conceding that it personally (through its regular corporate officers at Hull) ordered the loading of the coal and that it itself (through its New York managing agent) employed the shore servants or stevedores to do the actual loading, tried to bring the case within the so-called "sea servant" doctrine, and thus obtain an exoneration which it could not obtain unless it could pass the responsibility on to a sea servant. This shows that the implications of the "sea-servant" doctrine (if any such doctrine exists) should at least be narrowly construed by this Court; and that it should not be applied to a case in which the alleged negligent act of the sea servant did not occur at sea but occurred in the loading port while the vessel was still under the control

*This Court in *International Navigation Co.* v. *Farr*, 181 U. S. 218, held that a perilous condition on board a ship which could not be corrected after sailing, except by the expenditure of much time and labor in shifting cargo, rendered a ship unseaworthy, and quoted at 181 U. S. 223 and 224, a passage from the decision in *The Sylvia*, 171 U. S. 462, where this Court clearly points out what constitutes unseaworthiness in this connection. As the Circuit Court of Appeals has cited *The Sylvia*, 171 U. S. 462, at page 464, to sustain its finding of unseaworthiness, it is clear that the circumstances set forth above were those upon which the Court based its finding of the ultimate fact of unseaworthiness (R. 642).

of the shipowner's managing agent. Otherwise, a shipowner can always as a practical matter, in any serious case of damages, get a sea servant to come in, as here, and assume the responsibility as to any case of easily observable, but allegedly unknown and unsupervised, reckless carelessness or unseaworthiness in the loading port which makes the vessel unsafe to be ordered by the managing agent to sea.

Questions Presented to this Court.

The questions presented for decision are:

If damages result from failure to use reasonable care in the loading port to supply, prepare and inspect a vessel for sea, so far as protection against outbreak of fire is concerned, and if the unseaworthy condition of the vessel is discoverable by exercise of ordinary care before sailing, by even an unskilled person, is the Act of 1851 applicable as to such preventable loss, on the theory that the shipowner was not at fault or negligent in supplying, preparing and inspecting the vessel before it sent her to sea?

And is the Act of 1851 applicable if the additional fact appears that the shipowner held itself out as a common carrier under its corporate name, through its managing agent, in the loading port, and personally contracted and warranted, through its managing agent in that port, that the vessel on sailing would in fact be seaworthy so far as the exercise of ordinary care could make her so?

The Circuit Court of Appeals has decided the foregoing questions in the affirmative by holding that Congress intended by the Fire Statute to exempt the shipowner from liability on those facts, as concurrently found below.

Our contention is that, independently of contract, it is the personal duty of the shipowner to see to it that ordinary care is used in supplying, preparing and inspecting its vessel for sea, while she is still in the loading port,

where the cargo has been booked and shipped; and that certainly this is so where the shipowner personally has contracted and warranted that the vessel on sailing from the loading port will be seaworthy so far as use of ordinary care can make her so; and that such duty is non-delegable so far at least as an ordinary inspection by any unskilled person would have disclosed the unseaworthiness before the vessel sailed.

The unprecedented decision of the Circuit Court of Appeals in the present case is that the law places the statutory exception of "fire" on a more preferred basis than any of the other exceptions dealt with in the various Acts of Congress or in the maritime law, and that Congress by the fire statute intended not only to except loss from fire, but also loss from failure to take ordinary precautions while the vessel is still in the loading port under the control of the shipowner's managing agent to prevent outbreak of fire. No reason of equity or principle, however, is given by the Circuit Court of Appeals as to why they think that Congress intended to give the exception of fire this highly preferential *sui generis* status. The only reason given by the Circuit Court of Appeals is that the fire statute is mentioned in the contracts of affreightment (R. 647). "Assuming these contracts to have been personal, they expressly incorporated the exemption accorded by Section 4282" (C. C. A. Opinion, R. 647). But, inasmuch as the fire statute (Section 4282, R. S., re-enacted from Section 1 of the Limitation of Liability Act of March 3, 1851) is, as part of the law of the land, impliedly incorporated in every contract of affreightment, whether mentioned or not, and inasmuch as no question of waiver by contract is involved, no reason is given by the Circuit Court of Appeals (and, we submit, there is no valid reason) why the incorporation of that statute in a contract should give one of the contracting parties any greater rights than he would have if it were merely impliedly incorporated as part of the law

of the land. The plain fact, as concurrently found by both courts below, is that on sailing from the loading port the vessel in this case was not seaworthy so far as ordinary care could make her so, and that the fire was merely an inevitable and foreseeable result of that carelessness at the loading port. Damages flowing inevitably from such carelessness are not damages from "fire", so as to make the fire statute applicable.

The Circuit Court of Appeals went entirely outside the issues raised by the pleadings and announced the novel doctrine that the failure to supply a seaworthy vessel was not a failure of the shipowner but of the chief engineer of the vessel. But, so far as the shipowner and the shippers are concerned, the duty of supplying a seaworthy vessel is not that of the chief engineer. That duty rests on the shipowner personally both by maritime law since time immemorial, and independently by the very contracts of affreightment. The promise and warranty in every contract of affreightment that, at the time of sailing the vessel will be fit and safe to sail, is that of the owner and operator. That duty cannot be "delegated" to a chief engineer with whom the shipper has no relations whatever, either contractually or by maritime law. The Circuit Court of Appeals overlooked entirely the fact, pointed out by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. 2nd 232, that the duty to make the vessel seaworthy, so far as the shipper is concerned, is that of the shipowner personally, so that neglect to perform it before sailing, while the vessel is still in the loading port under the shipowner's personal control, constitutes personal "neglect" as that term is used in the proviso of the Fire Statute.

Argument.

I. The fire exception in the Act of 1851 has no application to damages which result inevitably from failure (while a vessel is still in the loading port under the control of the owner's general agent), to use reasonable care to supply, prepare and inspect the vessel for sea so far as protection against outbreak of fire is concerned,—particularly when the unseaworthy condition of the vessel is discoverable by exercise of ordinary care before sailing by even an unskilled person.

The conclusion of the Circuit Court of Appeals that the respondent was not guilty of negligence was based on the assumption of law that the respondent was under no personal duty in the loading port to see to it that ordinary care was used in preparing its vessel for sea, or to inspect her before ordering her to sail (R. 589, 590, 646, 647). A further assumption of law was made that the mere incorporation of the Fire Statute by a separate clause in the bill of lading had the legal effect of relieving the shipowner from what would otherwise be the plain meaning of the warranty of seaworthiness in another clause in the bill of lading. Not only are these assumptions of law not justified but the concurrent finding that the fire was inevitable from the observable unseaworthiness required a conclusion of law that the proximate cause of loss was not the fire or the negligent act of the chief engineer, but the unseaworthiness. Consequently the conclusion or finding of the Circuit Court of Appeals was, as this Court held in *The Edwin I. Morrison*, 153 U. S. 199, 215-216, a finding "determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to our revision."

The Circuit Court of Appeals at the end of its opinion

in effect says that if the respondent was under a personal duty to see to it that due diligence was used to make its ship seaworthy, it performed that duty because it was under no duty to hire a shore superintendent and because it was under no duty to require an inspection to be made by a Mr. Huff (R. 646, 647), who was a cargo surveyor not in the employ of the shipowner and who had nothing to do with the coal, or with the 'tween deck compartment where the fire occurred (R. 400, 402). We submit that this ground of decision is illogical, being a pure *non sequitur* and wholly ignores the nature of the duty of the shipowner, a common carrier, particularly when he has contracted specially as "owner" to exercise "due diligence to make the steamer seaworthy" (R. 30A).

In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 150, this Court said:

> "This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer *becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners;* and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage." (Italics ours.)

Both the Circuit Court of Appeals and the District Court overlook, and give no significance whatever in their final conclusion, to the important fact, as shown from the concurrent finding, that the fire was inevitable as a result of the unseaworthiness (R. 587, 642), and the admission in the answer that the losses sustained by the petitioners were all caused by the fire (R. 52). It is quite immaterial, there-

fore, whether the neglect which caused the unseaworthiness was the neglect of the owner in the five particulars mentioned by the Circuit Court of Appeals, or was the negligence of its employee, the chief engineer. Here there is an express warranty of seaworthiness which has been breached, and here also the unseaworthy condition was observable before sailing by even an unskilled person. It was this very point which the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. 2nd 232, decided the other way. In that case the Court held (33 Fed. 2nd at p. 234):

> "It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the ship. *Richardson* v. *Harmon,* 222 U. S. 96; *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334; *The Malcolm Baxter, Jr.,* 277 U. S. 323."

The decision now in review is squarely in conflict with that case. The Circuit Court of Appeals here when it stated that the decision of the District Court in *The Etna Maru,* 20 Fed. (2d) 143 was affirmed on another ground, was clearly in error. The able opinion by Judge Hutcheson in the District Court reviews all of the cases and is an excellent statement of the law. A comparison between that opinion and the opinion of the Circuit Court of Appeals for the Fifth Circuit does not disclose any difference of views between the two courts. The District Court dealt with the case as if the right of the owner to limitation of liability under section 3 of the Act of 1851, as well as to exoneration from liability for fire damage under section 1 of that Act, was involved; whereas the Circuit Court of Appeals found it unnecessary to decide the question whether the owner of the "Etna Maru" was entitled to limit its liability, because the value of the vessel was sufficient to pay all claims. We submit that the Circuit Court of Appeals in the present case was under a clear misapprehen-

sion in assuming that the affirmance by the Circuit Court of Appeals for the Fifth Circuit as to section 1, without passing on the question of limitation under section 3, constituted an affirmance "on another ground". The fact that the suit was *in rem* so that the liability of the ship rather than that of the owner was nominally being litigated, is unimportant. In *Liverpool Navigation Co.* v. *Brooklyn Terminal,* 251 U. S. 48, at pages 52 and 53, this Court held that in determining the applicability of the Limitation Act (of which the so-called Fire Statute is merely one section), it is immaterial whether the suit is *in personam* or *in rem.* Consequently, when the Circuit Court of Appeals for the Fifth Circuit decided in *The Etna Maru* that the ship was liable, it, under well-settled law, held that the shipowner was not exonerated from liability by the Fire Statute. It is plain that in so holding it was following this Court's decision in *The Malcolm Baxter, Jr.,* 277 U. S. 323, and also the other decisions it cites, that as to damages flowing from unseaworthiness, it makes no difference whether the negligence which causes the unseaworthiness is that of the owner himself or of his employee. The failure to correct unseaworthiness which existed before sailing and which ordinary care by any unskilled person would have discovered, is always want of due diligence on the part of the owner.

The District Court in the present case found (R. 589) that the dangerous and unseaworthy condition was discoverable by the use of due diligence "about the time of the departure". The District Court said: "Once the new supply had been loaded, no inspection of the temporary bunker would have disclosed the danger *until about the time of the departure*" (R. 589). (Italics ours.) In view of the well-settled law as repeatedly stated by this Court, that the warranty of seaworthiness applies at the time of departure from the loading port, this finding by the District Court necessarily called for a decision that the respondent was per-

sonally negligent in failing to supply a vessel which was seaworthy at the time of departure from the loading port so far as use of ordinary care could make her so, and that the respondent had not used such care. The ultimate conclusion of law of the District Court was, therefore, the opposite of what the facts found by it required. The District Court was evidently unaware, we respectfully submit, of the rule of law that the warranty of seaworthiness attaches at the time of departure. *The Caledonia,* 157 U. S. 124, at page 130; *The Sylvia,* 171 U. S. 462; *International Navigation Co.* v. *Farr,* 181 U. S. 218; *McFadden* v. *Blue Star Line,* 10 Asp. N. S. 55, 58; *Sumner* v. *Caswell,* 20 Fed. 249, 252; *In re Meyer,* 74 Fed. 881, 885; *The Eugene Vesta,* 28 Fed. 752; *Bowring* v. *Thebaud,* 56 Fed. 520 (C. C. A.); *The Newport,* 7 Fed. (2d) 452, 454 (C. C. A. 9); *Kaufer Co.* v. *Luckenbach Co.,* 294 Fed. 978. (See also Carver on Carriage of Goods by Sea, 7th Edition, page 30.) This is further apparent in view of the uncontradicted evidence that the dangerous and unseaworthy condition was obvious during the entire period of loading.

We submit that this conflict between the Circuit Court of Appeals of the Second and Fifth Circuits has already been resolved by the decision of this Court in *The Malcolm Baxter, Jr.,* 277 U. S. 323, 331, where this Court held that a shipowner is responsible for all the damages flowing from unseaworthiness, and is not entitled to the "exoneration and limitation of liability" permitted by R. S. Sections 4282-4289 (the Limitation Act of 1851) if he has failed to use due diligence to make his ship seaworthy. In that case this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of

liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R. S. Sections 4282-4289." (*The Malcolm Baxter, Jr.*, 277 U. S. 323, 331.)

And in the same case:

"But for all damages legally attributable to the breach of warranty of seaworthiness, petitioners may recover." (*The Malcolm Baxter, Jr.*, 277 U. S. at p. 333.)

But in the present case, the Circuit Court of Appeals virtually declines (R. 644-645) to follow *The Malcolm Baxter, Jr.*, and implies (R. 644-645) that the use of the language we have just quoted was an inadvertence on the part of this Court. The Circuit Court of Appeals said (R. 644-645):

"The libellants argue that whatever the British law may be, our decision must be rendered in their favor because of *The Malcolm Baxter, Jr.*, 277 U. S. 323. While the fire statute was not involved in that litigation, limitation of liability under section 4283 was, and the libellants seize upon the following language at page 331:

'Both courts below agreed that the "Baxter" was unseaworthy on sailing and that the respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. secs. 4282-4289. * * *'"

* * * * * * * *

"We feel confident that the Supreme Court did

not intend by this brief reference to the limitation statute to modify the long established construction of the phrase 'without the privity or knowledge of the owner'."

* * * * * * * *

"In the case of 'The Malcolm Baxter, Jr.', as appears from the decision of the district court (not officially reported), the vessel's hull had defects which an inspection would have disclosed but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity'. So understood the case is quite in line with earlier authorities."

The reference of the Circuit Court of Appeals to an absence of a warranty of seaworthiness in the bill of sale in the *Baxter* case, is wholly irrelevant, because the suit in *The Malcolm Baxter, Jr.* was on a contract of affreightment, and not on a bill of sale. This Court decided in that case that the shipowner was not entitled to the protection of the limitation acts because of its breach of the warranty in the contract of affreightment as to seaworthiness, together with the evidence that the unseaworthiness was discoverable and preventable before sailing by use of due diligence. No warranty in the bill of sale could, of course, have greater evidential effect in a suit for breach of a contract of affreightment than a certificate of seaworthiness. Indeed, it would not be of as much probative value as a certificate of seaworthiness, because the warranty in the bill of sale is that of an owner, who is not necessarily a skilled person, whereas, a certificate of seaworthiness is a statement of a skilled person. But it is settled by a long line of authorities that even certificates of seaworthiness are not proof of due diligence. See *Bank Line* v. *Porter,* 25 Fed. (2d) 843 (C. C. A. 4), where the authorities are collected.

The Circuit Court of Appeals further mistakenly assumed that in the *Malcolm Baxter, Jr.* case there was no survey of the vessel before she sailed from New Orleans (R. 645). But that there was such survey appears from the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at page 332, and from numerous places in the record in that case. This Court said:

> "Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a 'hog' or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence."

It is abundantly clear from the foregoing quotation that this Court in the *Baxter* case fully understood that there had been a survey before the vessel sailed from New Orleans, and that in stating its ground of decision as quoted by the Circuit Court of Appeals (R. 644-646), this Court had that fact in mind.

The Court below also overlooked the fact that in the opinion of the District Court in the *Baxter* case, the Court found that a surveyor of the New Orleans Board of Underwriters granted a certificate of loading and that a surveyor named Thompson also looked over the vessel. The District Court found that Thompson's survey was not as careful as it should have been. It said: "The chances are good that the defects would have been found at New Orleans had anyone cared enough to look for them." (See the record in the *Malcolm Baxter, Jr.* case, on file in this court, October Term, 1927, No. 459, Volume I of the

Transcript of Record, at pp. 241-243.) The fact is that there was considerable diligence exercised by the owner in the *Malcolm Baxter, Jr.* case, but here no diligence whatever was exercised by the respondent, or by the "Galileo's" officers, to protect the vessel from outbreak of fire. The plain and inescapable fact is that in the *Malcolm Baxter, Jr.* case, the owner was held liable because its surveyor did not make as careful an examination as he should.

Furthermore what was said by this Court in *The Malcolm Baxter, Jr.*, was no inadvertence, as is suggested by the Court below in its opinion (R. 644-646), because this Court in *The Malcolm Baxter, Jr., supra,* merely applied the rule laid down by it in *Richardson* v. *Harmon,* 222 U. S. 96; *Pendleton* v. *Benner Line,* 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139, and in *Capitol S. S. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

The decision in *The Malcolm Baxter, Jr., supra,* was also no inadvertence because of still another line of decisions of this Court. The leading cases are *The Caledonia,* 157 U. S. 124, *The Edwin I. Morrison,* 153 U. S. 199; and *The Carib Prince,* 170 U. S. 655.

In *The Caledonia,* 157 U. S. 124, at page 130, this Court said:

> "In *The Edwin I. Morrison,* 153 U. S. 199, 210, the language of Mr. Justice Gray, delivering the opinion of the Circuit Court in the present case, was quoted with approval, to this effect:
>
> 'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact sea-

worthy at that time, and does not depend upon his knowledge or ignorance, his care or negligence.'

After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated.

The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view.

In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

Again in *The Caledonia* (157 U. S. at p. 137), this Court said:

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, *and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel.*" (Italics ours.)

So also the Fire Statute does not relieve the owner from loss by fire caused by unseaworthiness which is discoverable by use of ordinary care before sailing, and does not reduce its duty to make the ship seaworthy in respect of fire.

Here the shipowner did nothing itself to make the ship seaworthy so far as protection from fire was concerned, notwithstanding the fact that the contractual provision is "the owners have exercised due diligence to make the steamer seaworthy" (R. 30A), and not that some subordinate of the shipowner would exercise due diligence to make the ship seaworthy. But assuming, for purposes of argument, the propriety of any delegation by the shipowner of this personal duty undertaken by it for a consideration, the freight money, it must necessarily, in order to avoid a personal breach of that warranty, at least see to it, by inspection of the vessel or otherwise, before sailing, that the person to whom it has delegated the performance of the duty has in fact performed it. *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. The unseaworthiness was not only known to the Chief Engineer, but it was also of so obvious a nature that unskilled laborers, the coal trimmers, complained of it. The fact that the unseaworthiness was not observed by its shore representatives is unimportant, because at all times while the vessel was in the loading port the owner had reasonable means of obtaining knowledge; and it failed to instruct its shore representatives at the loading port, New York, to inspect the ship, apparently under the assumption that by permitting itself and its shore servants to remain in ignorance of the condition of the ship, it would become entitled to the privileges granted by the Act of 1851.

This ingenious device to avoid the personal obligation to supply a ship which, at the time she is sent to sea from the loading port, is seaworthy so far as ordinary care can make her so, is not only opposed to the contract provision in this case and to the doctrine repeatedly reiterated by this Court, but, if approved here, would discharge the shipowner from all obligation to owners of cargo when the loss of cargo has been caused by failure of the shipowner to exercise any supervision over dangerous conditions which

would have been discoverable if any one interested enough on the shipowner's behalf had cared to look for them before sailing. If the seal of approval of this Court is put on this device, the shipowner has every inducement to stay away from his ship while she is in the loading port and also to keep his shore agents and representatives from going on board, for fear they might discover some condition which would cause the shipowner some liability or expense to remedy. Any such doctrine, obviously, directly tends to increase the danger while at sea to all persons and goods on ships leaving United States ports. It is a direct repudiation of the decision of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, where this Court unequivocally stated that it made no difference in so far as due diligence to make the steamer seaworthy is concerned whether or not the failure to exert due diligence was that of the shore servants or that of the sea servants, if it occurred before sailing.

See also *The Wildcroft*, 201 U. S. 378, where this Court was discussing a condition which "a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied" (p. 387). This Court reaffirmed what it had said in *International Navigation Co.* v. *Farr*, and said (in *The Wildcroft*, 201 U. S. at pp. 388, 389):

> "He (the shipowner) is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is within the control of the owner."

In *The Edwin I. Morrison*, 153 U. S. 199, at page 215, this Court said:

> "*The obligation rested on the owners* to make

such inspection as would ascertain that the caps and plates were secure." (Italics ours.)

The duty of inspection, whether imposed by Statute or by the Maritime Law or, as here, also expressly undertaken by contract, is wholly "within the control of the owner" (201 U. S. at p. 389). It was, therefore, incumbent upon the shipowner here to show that a due and proper inspection had been had and the vessel ascertained to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used (*The Wildcroft,* 201 U. S. at p. 387).

When, as here, the petitioners' loss legally flows from the unseaworthiness—*The Malcolm Baxter, Jr., supra*—the proximate cause of the loss is the unseaworthiness, and not fire. See *The G. R. Booth,* 171 U. S. 450, at page 460, where this Court discusses the question at great length. In that case this Court said:

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgment of this court, above referred to."

And again:

> "The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but on the contrary, it was an in-

cident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

The intervening fire on the "Galileo" was a mere incident, and an inevitable consequence, of the failure of "the owners" (R. 30A) to exercise "due diligence to make the steamer seaworthy".*

This is not a case in which the shipowner is excused by the contract or by a statute from liability for breach of the warranty of seaworthiness, that warranty in this case being that the vessel on sailing from the loading port would in fact be seaworthy so far as ordinary care could make her so. Congress surely did not intend any such result by the language used by it in the Fire Statute. Indeed, the language of the statute is not susceptible of an interpretation which would permit sending an unseaworthy ship to sea when ordinary care has not been exercised to make her seaworthy. It is therefore immaterial what the antecedent conditions were, whether or not due to negligence,

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*The writer of the opinion of the Circuit Court of Appeals inadvertently used the word "proximate" instead of "immediate" in stating that the petitioners conceded that the proximate cause of the loss was the fire. The statement is absolutely without support in the record, unless "proximate cause" is there used as meaning "immediate cause". The stipulation entered into on November 1, 1929, before respondent disclosed, on November 11, 1929, facts exclusively within its knowledge as to the obviousness of the unseaworthiness of the "Galileo" before sailing, was as follows (R. 556):

> "3. All of the merchandise shipped on the S. S. 'Galileo' on the voyage mentioned in the libels sustained some damage from fire occurring on board said steamer and/or water resulting from an effort to put out the fire."

Nothing whatsoever was said in the stipulation as to proximate cause, which was the issue litigated at the trial. The cargo damage, of course, followed the fire, but the fire was only the immediate cause, as was found concurrently below, because both courts found that the fire was inevitable on sailing. Moreover, this finding was based exclusively on evidence introduced by the shipowner in its defense long after the stipulation was entered into. Consequently, as the fire was inevitable at the time the ship sailed, and as the Circuit Court of Appeals itself found that this inevitableness of fire rendered the ship unseaworthy, it is clear that the proximate cause of the loss was the unseaworthiness and not the fire. The stipulation does not, nor was it ever intended to, alter this situation.

which resulted in the vessel becoming unseaworthy, because under the contract, and under maritime law, it was the inescapable duty of the shipowner to see to it that his vessel was seaworthy on sailing so far as ordinary care could make her seaworthy. The ingenious, but unsound, theory of respondent's counsel, which the Circuit Court of Appeals adopted, is that if one of the antecedent conditions of the unseaworthiness is negligence of a subordinate, then the shipowner is excused by the Fire Statute. And this notwithstanding "the owners" (R. 30A) promised in the written contract of affreightment that they themselves would exercise "due diligence to make the steamer seaworthy" (R. 30A). Under the concurrent findings of the Courts below and the peculiar doctrine announced by them, the anomalous result follows: If the shipowner, in answer to a *prima facie* case against him for non-delivery, himself introduces evidence, as here, establishing that his vessel on sailing from the loading port was unseaworthy and that the loss resulted inevitably from such unseaworthiness, he has thereby shown a breach by himself of the contract of affreightment, and the mere invoking of the Fire Statute or its incorporation in the contract is of no protection to him. However, if he continues introducing further evidence and offers testimony that one of his vessel's officers was negligent in the loading port in preparing the vessel for sea, and that this caused the unseaworthiness, then he is exonerated from liability because of the Fire Statute. In other words, it is only by ignoring entirely the concurrent finding of unseaworthiness and the inevitability of petitioners' damages from the unseaworthiness that the theory adopted by the Circuit Court of Appeals can be said to be rational. But the fact of unseaworthiness cannot, we submit, be ignored. The duty to make the ship seaworthy is the primary and most important duty of a shipowner in every contract of affreightment. *The Caledonia,* 157 U. S. 124. In so far as damages result inevitably from unseaworthiness,

negligence of a subordinate, and the effect of the Fire Statute, are immaterial. Failure to see to it that ordinary care is used to make the vessel seaworthy on sailing from the loading port is always negligence of the shipowner himself. Especially is this true when the shipowner himself has warranted that at the time of sailing from the loading port the vessel is in fact seaworthy so far as due diligence can make her so, and that he, himself, had exercised that diligence.

Judge Learned Hand has demonstrated that such a breach of warranty, in *The Soerstad,* 257 Fed. 130, legally constitutes personal neglect and privity. He says:

> "A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally a pure action of tort (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B., 11 Ed. IV, 6 plac. 11), and it was not till 1778, in *Stuart* v. *Wilkins,* 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.

Regarded in this way, which is probably the correct way historically, *it follows inevitably that a breach of warranty should be held to be with the warrantor's privity,* because all the elements of the cause of action are 'done, occasioned, or incurred' by him personally; that is to say, he personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. *Thus he personally occasions the loss.*" (Italics ours.)

In *Royal Exchange* v. *Kingsley Navigation Co.* (1923), Appeal Cases 235, at page 244, the Privy Council said:

"Mr. Mather, in his cross examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, 'Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water.' *Their Lordships cannot doubt that the unseaworthiness of the 'Queen City' was the natural and direct cause of leakage,* sufficient to bring water into contact with the lime cargo, *and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship,* and is not a loss arising from fire within the protection of s. 7 (of the Canadian Water Carriage of Goods Act). *The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken,* and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proximate cause of a loss is not necessarily the cause nearest in time.

The question of onus is not material in these circumstances; but if a shipowner seeks to escape lia-

bility, on the ground that the loss did arise from fire, the onus of showing that the loss did arise from fire is affirmatively upon him." (Italics ours.)

The Circuit Court of Appeals assumed that this decision of the Privy Council went off on a difference in language between the Canadian Water Carriage of Goods Act and our Limitation Act. The passage here quoted from the judgment of the Privy Council, shows, however, that such was not the case.

Moreover, "the question of onus" is, as the Privy Council points out, most material if the question discussed is whether or not the owner is entitled to the benefits of the Fire Statute. Hence, when the Privy Council says that the question is not material in respect of a loss caused by unseaworthiness, it is clear that in the opinion of the Privy Council the Fire Statute has nothing to do with a loss so caused, even though a fire be a link in the chain of causation. See also: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1915), A. C. 705, and the decision of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter,* 25 Fed. (2d) 843; certiorari denied, 278 U. S. 623.

In *Paterson, Zochonis & Co.* v. *Elder Dempster & Co.,* L. R. 1924 Appeal Cases 522, at page 548 (House of Lords), Lord Sumner, delivering his judgment, said:

> "The contract of carriage excepts liability for damage by improper stowage; but, if there was a breach of the implied warranty of seaworthiness, which *there is nothing in the contract to limit or oust,* none of the exceptions or limitations contained in the bill of lading avail to prevent the cargo-owner from recovering.
>
> Two things must, therefore, be shown: (1) that the ship was unseaworthy in the sense of the word established by the decisions, and (2) that the dam-

age complained of was caused thereby and would not have arisen but for that unseaworthiness." (Italics ours.)

The rule there stated by Lord Sumner is the rule applicable here. In view of the concurrent finding of fact by the Courts below that the "Galileo" was unseaworthy, and that the fire resulted inevitably from the unseaworthiness, and the admission in respondent's answer (R. 52) that all the damages sued for resulted from that fire, the fire and limitation statutes and exceptions should be held inapplicable and the respondent be held liable for the damages flowing from the unseaworthiness.

In *Chesapeake Lighterage Co.* v. *Baltimore Co.*, 40 Fed. (2d) 394 (C. C. A., 4), the master negligently permitted the charterers to load a large quantity of copper bars on his vessel, which was not in seaworthy condition to receive them, with the result that she soon sank. The shipowner introduced evidence that he had no knowledge of the unseaworthiness or the negligent loading, and therefore asked for limitation of liability. The Circuit Court of Appeals for the Fourth Circuit, in meeting this contention, said (40 Fed. 2nd 394, at page 395):

> "For authorities on the law that controls the question as to the privity or knowledge of the owner, reference to *The Virginia* (D. C.) 264 F. 986; *Sorenson et al.* v. *Boston Insurance Co. of Boston, Mass.*, 20 F. (2d) 640, and *Bank Line* v. *Porter* (*The Poleric*), 25 F. (2d) 843, will show the rule as laid down by this court. Under these decisions the judge below rightly held that the superintendent of the appellant company could, by proper inspection, have discovered the unseaworthiness of the barge, and that the appellant was therefore chargeable with knowledge of such unseaworthiness.
>
> The decree of the court below is accordingly affirmed."

In *United States* v. *Charbonnier* (*The Pinellas*), 45 Fed. (2d) 174, at page 177, the Circuit Court of Appeals for the Fourth Circuit, said:

> "The owners contend that even if the ship was unseaworthy, the evidence does not show that they were personally negligent in this respect, because the ship was built by an experienced and competent builder and was passed by official surveyors of the American Bureau of Shipping as being seaworthy in all respects; and it is pointed out that in such well-known cases as *Walker* v. *Transportation Co.*, 3 Wall. 150, 153, 18 L. Ed. 172, and *The Strathdon* (D. C.), 89 F. 374, it was held that the neglect which deprives the shipowner of the protection of the Fire Statute is his personal neglect and not merely the neglect of his officers or agents in charge of the ship. But in each of these cases, there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage."

Again in *United States* v. *Charbonnier* (45 Fed. 2nd, at p. 177), the Circuit Court of Appeals for the Fourth Circuit said:

> "It is said that the implied warranty of seaworthiness applies to every contract of affreightment and imposes upon the owner the duty of furnishing a seaworthy ship which may not be delegated by him to anyone else. See *The Etna Maru* (C. C. A.), 33 Fed. 2nd 232.
>
> We are not disposed to criticize the rule laid down in this case, but it is not necessary to go to this length in order to find ample ground upon which to sustain the decision of the District Court."

In *The Poleric* (*Porter* v. *Bank Line, Ltd.*), 25 Fed. (2d) 843, certiorari denied 278 U. S. 623, the Circuit Court of Appeals for the Fourth Circuit found that the fire in that

case was due to the unseaworthiness of the vessel at the beginning of her voyage from Calcutta to New York, and said:

> "It is contended on behalf of the respondent that it is exempted from liability by the fire statute. This statute is set out in full in *The Poleric, supra.* On this point we agree with the learned judge below, when he says: 'In view, however, of the decision which I have reached on the subject of the seaworthiness of the "Poleric" at the commencement of the voyage, what is said above may after all be wholly academic since, if the ship was not seaworthy, and this fact was due to the personal negligence of the owner, and the failure in that respect was the cause of the loss, that of itself would make the statute inoperative. *The Virginia* (D. C.), 264 F. 986; *Hines* v. *Butler* (C. C. A.), 278 F. 877; *The Elizabeth Dantzler* (D. C.), 263 F. 596; *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1914), 1 K. B. 419-424 (1915) A. C. 705.'"

All of these cases accept the principle that a failure to exercise due diligence in the loading port to make the ship seaworthy, constitutes negligence of the owner and for that reason the fire statute does not apply.

In *Christopher* v. *Grueby* (*The Commonwealth*), 40 Fed. (2d) 8 (C. C. A. 1), the shipowner was held liable for personal injuries sustained by seamen resulting from a fire caused by the negligence of the engineer of the vessel in spilling gasoline while pouring it from a can into the reservoir of the lighting plant, thus permitting it to become ignited. The lighting plant on the vessel was not supplied with pipes for gasoline. Consequently, the reservoir had to be filled by pouring the gasoline from a can. The shipowner claimed the protection of the limitation statute, denied personal knowledge, and alleged the matter was a technical one for experts and not for an unskilled shipowner. The Circuit Court of Appeals for the First

Circuit held that the shipowner must be presumed as a matter of law to have personal knowledge or means of knowledge of dangerous fire hazards existing on his own vessel before sailing, and of the fact that gasoline was likely to be spilled, saying:

> *"It did not require the knowledge of an expert to appreciate this. The average man who gave the situation any consideration would understand and appreciate it.* * * * It is true that the 'owners' duty did not require them to provide a vessel of fireproof construction, or to adopt the latest appliances, or the best safety devices'; but it did require them to provide reasonably safe appliances and equipment that would render those appliances reasonably safe for the use to which they were to be put in the place where installed and the condition there existing." (Italics ours.)
>
> * * * * * * * * *
>
> "Was the fire caused by the negligence of the owners or any of them in failing to provide and equip a seaworthy vessel?
>
> The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work." (Italics are the Court's.)
>
> * * * * * * * * *
>
> "The District Court found that the fire was due to the negligence of the engineer and not from any defective condition of the machinery or equipment on board the vessel. *But it does not follow that because the engineer may have been negligent that the owners are free from fault."* (Italics ours.)

This is in accord with the decision of this Court in *Pacific Co.* v. *Peterson,* 278 U. S. 130, at page 138, that

"unseaworthiness as is well understood, embraces certain species of negligence".

The Circuit Court of Appeals for the Ninth Circuit, in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. (2d) 769, held that the duty to make a ship seaworthy was non-delegable. As this duty is non-delegable any breach of it is a personal fault of the person upon whom the duty lies.

In *The Annie Faxon*, 75 Fed. 312 (C. C. A. 9), the Court said:

> "We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, *unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person.* * * *
>
> "When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded *of the inspector of a boiler.* It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern *injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert.*" (Italics ours.)

None of the foregoing authorities, with the exception of *Bank Line* v. *Porter*, 25 Fed. (2d) 843 (C. C. A. 4), and *Charbonnier* v. *United States*, 45 Fed. (2d) 166, are mentioned by the Circuit Court of Appeals in the present case;

and these two cases are dismissed without reference to the principles therein discussed.

The Circuit Court of Appeals in the present case places its reliance upon two distinct propositions and citations of cases. The first proposition relied upon by the Circuit Court of Appeals is "That negligence of the ship's officers in causing a fire is not to be imputed to the owner so as to deprive him of the statutory immunity" (R. 643); in support of which the Court cites: *Walker* v. *Transportation Company*, 3 Wall. 150; *Craig* v. *Continental Insurance Co.*, 141 U. S. 638; *Keene* v. *The Whistler*, Fed. Cas. No. 7645 (D. Cal.); and *The Strathdon*, 89 Fed. 374, E. D. N. Y. (same case), 94 Fed. 206, affirmed 101 Fed. 600 (C. C. A. 2). The Circuit Court of Appeals overlooked the legal proposition that the damages here sued for flowed from unseaworthiness. The plain distinction between those cases and this case, as pointed out by the Circuit Court of Appeals for the Fourth Circuit, in *Charbonnier* v. *United States*, 25 Fed. (2d) 174, at page 177, is that in the *Walker* case and *The Strathdon*, "there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage". This distinction on the facts renders those cases entirely inapplicable here. *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, did not involve the Fire Statute at all. The other case mentioned by the Circuit Court of Appeals is an old District Court case in California, *Keene* v. *The Whistler*. What was said in that case is diametrically opposed to what was said a few years later in the Circuit Court of California in *Lord* v. *Goodall*, Fed. Cas. No. 8506 (see p. 43 of this Brief, where we quote the language of the Court). It therefore cannot now be considered law even in California.*

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*The decision of Judge Hoffman in *Keene* v. *The Whistler*, Fed. Cas. No. 7645, on the question of the liability of part owners must also be considered as overruled since the decision of this Court in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 150.

The Circuit Court of Appeals for the Fourth Circuit (in *United States* v. *Charbonnier,* 45 Fed. 2nd 174, 177) was clearly right in its statement respecting *Walker* v. *Transportation Co.* (3 Wall. 150), for in the *Walker* case this Court did not even suggest that it was deciding any of the questions presented here. The facts in that case were that the crew failed to attend fires in a vessel's boilers and left her unattended for the night. During the night the vessel and cargo were destroyed by fire before the vessel had sailed from her loading port and while she was away from her loading berth, tied up at the dock of Huff & Company. Such negligence was a failure to perform a mere routine duty in caring for the furnaces overnight and not a failure in respect of the seaworthiness of the vessel.

No breech of warranty was involved in the *Walker* case. No reference is made anywhere in the opinion to the shipowner's liability for a breach of the warranty of seaworthiness. Indeed, there could not be, because there was no warranty involved. It is well settled that the warranty of seaworthiness does not apply as of the time that the vessel is tied up and not taking cargo. See *McFadden* v. *Blue Star Line* (1905), 1 K. B. 697, at page 704, where it was said:

> "So, too, it is clear that the warranty of the ship being fit to encounter the perils of the voyage does not attach before she sails and while she is still loading her cargo. There is, of course, no warranty at the time the goods are put on board that the ship is then ready to start on her voyage; for while she is still loading there may be many things requiring to be done before she is ready to sail. The ordinary *warranty of seaworthiness,* thus, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: *it takes effect at the time of sailing, and at the time of sailing alone.*" (Italics ours.)

In *Bowring* v. *Thebaud*, 56 Fed. 520, at page 523, it was held that there was also a warranty of portworthiness. The Court quoted with approval the following language from the opinion of Mr. Justice Field in *Cohn* v. *Davidson*, 2 Q. B. Div. 455:

> "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel seaworthy for port, and even for loading in port, may be, without breach of warranty, whilst in port, unseaworthy for the voyage (*Annen* v. *Woodman*, 3 Taunt. 299); but if she put to sea in that state the warranty is broken. Now, the degree of seaworthiness which the merchant requires is seaworthiness for the voyage; and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet."

But the warranty of fitness to receive cargo is not a continuing warranty. See *Oneida Navigation Co.* v. *L. Richardson & Co.*, 282 Fed. 241, at page 243, where the Court quotes the following passage from Carver on Carriage of Goods by Sea, 6th Edition, page 27 [repeated in 7th Edition, Section 21, page 30]:

> "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one, viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing. * * * Similarly the warranty of fitness to receive the cargo is not a continuing warranty after the goods are put on board; the warranty is that at the time the goods are put on board the ship is then

[fit] to receive them and encounter the ordinary perils during the loading stage."

It follows from these authorities that in the *Walker* case, *supra*, at the time the "Falcon" was tied up at the dock of Huff & Company, she was neither subject to the warranty of fitness to receive cargo (the cargo on board having already been received and the remainder of the cargo having nothing to do with that cargo) nor to the warranty respecting seaworthiness at the time of sailing, as that time had not come. It is clear, therefore, that the question of breach of warranty was not in the case. This Court naturally dealt with the case without reference to the question involved here, because in the absence of a warranty, there could be no breach. The only negligence was that of the ship's officers in caring for the ship in the matter of looking after her during the night time. Their neglect consisted in leaving the ship with no one to look after her fires. It was not in any sense a question of the unfitness of the ship or of the shipowner's coal or supplies on board which caused the fire.

The second proposition relied upon by the Circuit Court of Appeals is that the construction placed on the phrase "without the privity or knowledge of the owner" in former cases is inconsistent with the meaning of this Court's language in the passage which it quotes from *The Malcolm Baxter, Jr.*, 277 U. S. 323. In support of that proposition the court cites the following cases, which we now discuss in detail:

In *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, the first case cited by the Circuit Court of Appeals, there was no finding of fact that the vessel was unseaworthy at the time of sailing from the loading port, and the case did not purport in any way to deal with the question of unseaworthiness. Indeed, the negligent act in the case occurred long after the vessel had sailed from her loading

port. There was no negligence of anyone in that case which could possibly have resulted in causing the vessel to become unseaworthy at the time of sailing from her loading port. The only question involved in that case was whether underwriters, who had accepted an abandonment of an insured vessel, were entitled to the protection of the limitation statute.

The second case cited by the Circuit Court of Appeals is *La Bourgogne,* 210 U. S. 95. That case deals solely with negligence of the ship's officers, also occurring after the vessel had sailed from her loading port, and has nothing whatever to do with the question of unseaworthiness or damage flowing from unseaworthiness.

The third case cited by the Circuit Court of Appeals, *Lord* v. *Goodall S. S. Co.,* 4 Sawyer 292, Fed. Cas. No. 8506, did not involve the question of unseaworthiness. The facts there were that a ship, after leaving San Francisco, bound for San Diego, went ashore at Point Sur in a dense fog and was wrecked. After reviewing the history of the limitation statute and discussing *Walker* v. *Transportation Company,* 3 Wall. 150, the Court said (Fed. Cases 8506 at p. 887):

> "It is the duty of the owner, however, to provide a vessel with a competent master and a competent crew; and to see that the ship when she sails is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; *and if, by reason of any fault or neglect in these particulars, loss occurs, it is within his privity within the meaning of the act.*" (Italics ours.)

And again (Fed. Cases 8506 at p. 888):

> "Where a vessel is properly officered, manned and equipped, so as to render her seaworthy when she

leaves port, any loss resulting from causes *arising during the voyage after she leaves port,* without the privity or knowledge of the owner, will be within the protection of the statute." (Italics ours.)

What was said in the *Goodall* case is, therefore, precisely the opposite of the point for which it is cited by the Circuit Court of Appeals in the present case.

The fourth case cited by the Circuit Court of Appeals is *The Republic,* 61 Fed. 109 (C. C. A. 2). *The Republic* does not in any sense decide the proposition for which it is cited by the Circuit Court of Appeals. The court in *The Republic* did not have before it a case involving the negligence of a ship's officer, as the Circuit Court of Appeals in this case says. It held that the President of an owning company was negligent because "the loss arises from a defective condition of his ship of which he was ignorant, because of his own negligent examination of the vessel" (61 Fed. 112). In reaching that conclusion, the court stated that it did not feel it necessary to discuss the question dealt with in the decision of the District Court (reported as *In re Myers Navigation Co.,* 57 Fed. 240),—whether when a shipowner is guilty of a breach of a warranty of seaworthiness, it can claim the benefit of the limitation statute.

The fifth case cited by the Circuit Court of Appeals, *The 84-H,* 296 Fed. 427 (C. C. A. 2), did not deal with a contract of affreightment at all, but with a claim which had been made for the loss of life of a workman. No question of seaworthiness was involved in the case.

The sixth case cited by the Circuit Court of Appeals is *Arkell & Douglas* v. *United States,* 13 Fed. (2d) 555, at page 558 (C. C. A. 2). In that case the decision actually was that the shipowner was not entitled to limitation of liability because the managing agent of the company had

privity or knowledge of the dangerous condition. The case is further distinguishable on the ground that the vessel in that case was found as a fact to have been seaworthy in all respects at the time she sailed from her loading port, Port Arthur, and it was only because of an incident happening at an intermediate port, Galveston, that the danger and loss resulted. See 13 Fed. (2d) 555, at pages 555-556.

The seventh case cited by the Circuit Court of Appeals is *In re Spencer Kellogg & Sons*, 52 Fed. (2d) 129. This case did not involve a contract of affreightment or any question relative to a warranty of seaworthiness, and the shipowner in that case was in fact denied limitation of liability because its "works manager" had privity or knowledge of the negligence causing the loss. And the court further pointed out that it was immaterial that the works manager was not an officer of the company and that he disregarded his instructions from the officers of the shipowner. The court said (52 Fed. (2d) 131):

> "It is immaterial whether he disregarded his instructions. His fault charged his principal as though the limitation statute did not exist."

That decision denying limitation to the shipowner was affirmed by this Court in *Spencer Kellogg & Co., Inc.* v. *Hicks*, 285 U. S. 502.

The Circuit Court of Appeals clearly erred in holding in effect that Congress intended by the Fire Statute not only to relieve shipowners of loss by fire not caused by their neglect, but also to relieve them from the duty of taking ordinary precautions to prevent outbreak of fire. Under the decision of the Circuit Court of Appeals it is no longer the duty of shipowners to exercise reasonable control, supervision and inspection over vessels while they are still in the loading port and under their control to make them safe against outbreak of fire. That duty (al-

though specified in the contract as being that of *"the owners"*—R. 30A—of the vessel) is now (according to the Circuit Court of Appeals) the duty only of a chief engineer who has no relation of contract with the shippers. The court goes further and holds that the Fire Statute relieves the shipowner of this duty although the shipowner has contracted *as a common carrier* to exercise such control, supervision and inspection, and has personally booked the cargo and entered into the contracts of carriage in its own name at the loading port. The Circuit Court of Appeals reached this conclusion by holding as a matter of law that this duty of the shipowner could be abrogated or delegated entirely to an officer of the ship or "sea servant" (as defined by this Court in *International Navigation Co.* v. *Farr,* 181 U. S. 218), even before the ship sailed. Such an interpretation of the fire provision of the Act of 1851 necessarily applies to the other sections of that Act, and, if the interpretation is correct, shipowners will be encouraged to take no personal interest in making their ships safe to proceed to sea, and to abrogate all duties of management. We submit that the Circuit Court of Appeals, in ascertaining whether or not the respondent was negligent, has applied a rule of law which is altogether unsound. The error of the Circuit Court of Appeals was in holding that the duty of the respondent of seeing to it that its vessel was seaworthy so far as care could make her so was less than that of a common carrier. Such a theory was specifically condemned by this Court in *Bank of Kentucky* v. *Adams Express Company,* 93 U. S. 174, at page 180. In that case this Court held that the duty of a common carrier is "to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it"; that "the duty of a common carrier is to transport and deliver safely" (p. 180); that a bill of lading exception against loss by "fire" does not authorize the carrier to delegate to some one else his contractual duty of seeing to it that due care is in fact used to protect the goods from fire, because the com-

mon carrier has undertaken "for himself to perform an entire service"; and that "for these reasons we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed" (93 U. S. at p. 183). The ground of decision of the Circuit Court of Appeals also conflicts with the decision of this Court in *The Caledonia,* 157 U. S. 124. There this Court held that "the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel". When, as here, a shipowner fails in his contractual duty to supply a seaworthy ship, and loss results from such failure, the loss is not a loss from fire, and neglect with respect to the fire is immaterial. The only relevant fault is the failure of the owner himself to comply with his contractual duty to exercise due diligence to see to it that his vessel is seaworthy so far as reasonable care exercised by an ordinarily prudent man can make her so.

1-A. Neither the exception in the bill of lading of loss "by fire or flood, from any cause or wheresoever occurring", nor the insertion of a clause worded as follows, "This shipment is subject to all the terms and provisions of and all exemptions from liability contained in * * * Sections 4281 and 4287, each inclusive, of the United States Statutes" reduces or impairs the personal duty imposed by the warranty in a separate and distinct clause in the bill of lading that the responent would supply a vessel which on sailing from the loading port would be in fact seaworthy against fire so far as use of ordinary care in the loading port could make her so, and that "the owners" (R. 30A) of the vessel would themselves exercise the necessary due diligence to make the vessel seaworthy. The contract does not authorize the delegation of that duty.

The only modification in the bill of lading of the absolute warranty implied by maritime law that the vessel would in fact be seaworthy on sailing was as follows: "The carrier shall not be liable * * * for any loss * * * by * * * unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy" (R. 30-A).

(a) Nowhere in that entire clause dealing with seaworthiness and losses from unseaworthiness is there any mention (or incorporation by reference) of the Fire Statute or of any of the other sections of the Limitation Act of 1851, the clause dealing with "United States Statutes" being entirely separate and distinct.

(b) No mention is made in the bills of lading forms A, F, G and Q (covering most of the cargo) of Section 4282— the section of the Limitation Act of 1851 relating to fire;

(c) The clause is ambiguous and, therefore, must be construed against the shipowner who drafted it;

(d) Under the well settled rule of public policy in this country, neither the Fire Statute nor the Limitation Act has any application to a shipowner's personal contract; and

(e) Neither the Fire Statute, nor the Limitation Act, has any application to damages resulting solely and inevitably from failure or neglect in the loading port to supply and prepare a vessel properly for sea.

The Circuit Court of Appeals brushed this proposition aside by saying:

> "Assuming these contracts to have been personal they expressly incorporated the exemption accorded by Section 4282" (R., 647).

The Circuit Court of Appeals could only have meant

that the shipowner had modified its duty to furnish a seaworthy vessel by "expressly incorporating" in its bills of lading one of the clauses quoted in full in the footnote on pages 8 and 9 of this brief. A reference to the record (the citations are in the footnote at pp. 8 and 9 of this brief), shows, however, that the Circuit Court of Appeals was under a clear misapprehension as to the language in the bills of lading covering most of the cargo on the "Galileo" (R. 50A). Section 4282 (the Fire Statute) is not even mentioned in any of the forms—Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C), Exhibit Q (R. 46C), which cover the vast majority of the cargo. (See list or statement of shipments under the various forms of bills of lading, R. 50A.) As to the remaining forms, covering a minority of the cargo, the clauses referring to the Fire Statute are quoted in full in the footnote on page 8 of this brief.

In bills of lading Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C) and Exhibit Q (R. 46C), the language used is:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

There are no such statutes as "Sections 4281 and 4287, each inclusive, of the United States Statutes". If it be assumed in favor of the shipowner that the language means "Revised Statutes" the clause still does not refer to the Fire Statute. Section 4281 of the Revised Statutes of the United States, now United States Code, Title 46, Section 181, deals merely with the carrying of precious metals and other valuables and has nothing to do with fire; and Section 4287,

Revised Statutes of the United States, now United States Code, Title 46, Section 187, deals only with the reservation of a shipper's rights as against masters, officers or seamen. Neither of these sections has anything whatever to do with fire, nor with an owner's right to limit his liability. (See full text of these statutes, Appendix A of this brief.) If it should be contended that the court should supply the omission of the word "Revised" before the word "Statutes" contained in the clause, and supply the words "Sections 4282 and 4283" now omitted from the clause; or if it should be argued that this Court should substitute the word "to" for the word "and" now appearing in the clause between the figures "4281 and 4287", the complete answer is that this Court decided in *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, and in *The Caledonia,* 157 U. S. 124, that ambiguities in a bill of lading must be resolved strictly against the shipowner who drafted it.

The theory of the Circuit Court of Appeals that the mention of the Fire Statute in the bills of lading has any bearing whatever on the case conflicts with the decision of this Court in *The Caledonia,* 157 U. S. 124, that the "obligation to furnish a seaworthy ship should not be held to have been contracted away by implication" and with the decision in *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, at page 180, that the nature and extent of the fundamental duty of a common carrier to carry safely are "to be determined *by the nature of their business, not* by the *contract* they made respecting the liabilities which should attend it." (Italics ours.)

In *The Caledonia,* 157 U. S. 124, at page 137, this Court laid down the following rule:

> "There was no exception in this bill of lading which in express words exempted the shipowner from

furnishing a seaworthy vessel at the commencement of the voyage. As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly against them, and *we perceive no reason why the obligation to furnish a seaworthy vessel should be held to have been contracted away by implication.*" (Italics ours.)

The bill of lading clause quoted above cannot operate to contract away the shipowner's "obligation to furnish a seaworthy vessel" except by implication. It in no place suggests that intent, much less says so "in clear terms".

Later in *The Carib Prince,* 170 U. S. 655, this Court reaffirmed what it had said in *The Caledonia.* In that case the bill of lading contained an exception against latent defect, and it was argued that this exception operated to modify the warranty of seaworthiness. This Court held that such an exception had no such effect as it could not be extended by implication to include latent defect existing at the time of sailing. In the course of its opinion this Court said (*The Carib Prince,* 170 U. S. 655, at p. 659):

> "The principle upon which the ruling rested (referring to *The Caledonia*) was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The rule thus announced in *The Caledonia* but expressed the doctrine stated by Lord Selborne in *Steel v. State Line Steamship Co.,* L. R. 3 App. Cas. 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive a construction not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken."

Furthermore, to say that the incorporation of the Limitation Statute in the bill of lading has the effect of modifying the warranty of seaworthiness, especially when the implied absolute warranty has already been reduced by contract to an obligation to see to it that due diligence is used to make the ship seaworthy, is to say that in so far as risk from fire is concerned, the owner may by contract relieve himself from his own negligence in respect of fire, and that the shipowner is under no obligation to see to it that his ship is seaworthy in respect of fire. This we submit is exactly what this Court said in *Phenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322, a shipowner under our law is not permitted to do.

Although it is unnecessary to our argument in the present case, it should not be overlooked that there is still a broader principle which precludes the conclusion reached by the Court below, namely, that the fire statute does not purport to relieve a shipowner from his liability for negligence as that liability was defined before the fire statute was enacted. The statute has merely the same legal effect as an express stipulation in a bill of lading excluding liability for damage from fire. Such an exception by contract or statute against damage by fire does not relieve from liability for negligence.

In *Phenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, at page 322, this Court said:

> "The stipulation in these bills of lading that the carriers 'shall not be liable for loss or damage by fire, collision, or the dangers of navigation', clearly does not protect them *from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for loss caused by negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void.*

Railroad Co. v. *Lockwood,* 17 Wall. 357; *Railroad* v. *Pratt,* 22 Wall. 123; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Railroad Co.* v. *Stevens,* 95 U. S. 655." (Italics ours.)

In dealing with this question as to the effect of an exception or statute exempting from damage by fire on the liability of a shipowner for negligence in connection with unseaworthiness, the Circuit Court of Appeals in the present case relies on certain English decisions. One of them is a decision of the House of Lords—*Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, L. R. 1931 A. C. 726. It failed to note, however, that the shipowner in that case was not a common carrier at all (see L. R. 1931 A. C., at pp. 731 and 743), and that the House of Lords was dealing with a case where the Trial Judge had found that there was no negligence on the part of anybody. The following is the finding of Mr. Justice Wright, the Trial Judge, which was accepted by the House of Lords:

> "A survey might well not have revealed the danger. If I do not feel able to say definitely that the master was in fault in doing as he did, I do not feel able to say that the managers were in fault in not imposing on the master specific instructions" ((1930) 1 K. B. 699, at p. 711).

Moreover, the contract of affreightment in the *Tempus Shipping Company* case was evidenced by a charter party, the usual document used for freighting a vessel as a private carrier, and the bill of lading contained no such provision as appears here. Viscount Dunedin in the course of his judgment, took occasion to emphasize this fact. See *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* (*supra*), at pages 733, 734.* But even should we assume that the facts in the two cases were identical, there is a funda-

*Also the word "actual" which appears in the British statute before the words "fault or privity" is not contained in our statute. See Appendix A of this brief.

mental distinction between the law of the United States and that of England which renders the English cases inapplicable here. Indeed, Lord Atkin in his judgment in the *Tempus Shipping Company* case (*supra*), at pages 751, 752, declined "to deal with" a decision of this Court for that reason. He said:

> "I have not thought it necessary to deal with the decision of the Supreme Court of the United States in *The Irrawaddy*, 171 U. S. 187, because, as pointed out by Greer, *L. J.*, in the Court of Appeal, that case was decided on distinctions then existing* between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention."

See also *Tempus Shipping Co.* v. *Louis Dreyfus & Co.* (1931), 1 K. B. 195 at p. 214, where in the Court of Appeal Lord Justice Greer points out the distinction between our law and that of England "on the question of the liability of a shipowner to a cargo owner", which is the precise question involved here.

Upon examination of this Court's decision in *The Irrawaddy, supra,* it will be found that the distinction referred to by Lord Atkin is (171 U. S. 187 at p. 195):

> "By the English law, the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit."

Whereas, in the United States—(*The Irrawaddy*, 171 U. S. 187, at 190)

> "it is the well-settled law of this court that a com-

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* Lord Atkin was under a misapprehension if he meant to imply that the law as stated in *The Irrawaddy* has since been changed, either by Act of Congress or by decision of this Court. Indeed, later decisions of this Court reiterate the doctrine of *The Irrawaddy*. See *The Chattahoochee*, 173 U. S. 540, 554; *Knott* v. *Botany Mills*, 179 U. S. 69, 73; *The Southwark*, 191 U. S. 1, 6; *The Jason*, 225 U. S. 32, 49, 52, 54.

mon carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397.

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408; *The E. J. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124."

In England a shipowner may, as this Court pointed out in *The Irrawaddy*, 171 U. S. 187, make any contract he sees fit, and the English courts deal with a bill of lading clause providing that a shipowner shall be exempted from unseaworthiness when he has used due diligence to make his ship seaworthy, as a contract on the part of the shipowner *to exclude* the Fire Statute. See *Virginia Carolina Chemical Co.* v. *Norfolk, etc. S. S. Co.* (1912), 1 K. B. 229; *Ingram & Royle* v. *Services Maritimes du Treport* (1914), 1 K. B. 541, at page 554. The Circuit Court of Appeals in the present case has chosen to follow the theory announced in these English cases. These English cases proceed on the assumption that the Fire Statute, which is but a part of the Limitation Statute (as appears from the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331;—see also *La Bourgogne*, 210

U. S. 95, at pages 120-122, and *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 518), applies to the personal obligation of the shipowner. This Court, however, has taken an entirely different view. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 149; and *Pendleton* v. *Benner Line*, 246 U. S. 353.

In the English cases just cited, the court interpreted the Fire Statute as applying to unseaworthy vessels because, said the court, if the Statute did not apply to unseaworthy vessels, then the word "seaworthy" would have to be read into the British Statute so as to make the Statute read "in seaworthy British vessels". It is obvious, of course, that both the British and American Fire Statutes do apply to unseaworthy vessels in so far as the loss results from fire and not from unseaworthiness. But this Court's rule is that the Statute has no application to liabilities flowing from unseaworthiness when there is a personal undertaking that the shipowner will see to it that his vessel is seaworthy, or where the unseaworthy condition is discoverable by use of due diligence before sending the vessel to sea. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139. Having no application to such liabilities, it is difficult to see how incorporating the Statute in the bill of lading affects the matter. Or to put the law as expressed by this Court in *The Malcolm Baxter, Jr.* (*supra*), our law, at least in so far as common carriers are concerned, is that the Act of 1851 has no application to losses flowing from a failure to use due diligence to make a vessel seaworthy at the time she sails from the loading port. This Court has consistently refused to take the view of the English courts that a shipowner may contract as he pleases to exclude liability under a contract of carriage when such exclusion involves absolving a carrier from a personal duty of seeing to it that due care is used to make the vessel seaworthy on

sailing from the loading port. And even if we assume that the facts in the *Tempus Shipping* case were the same as in the present case, the fundamental difference between the public policy of this country and that of England with respect to the personal duty of a shipowner makes those decisions of no value in the American courts "on the question of the liability of a shipowner to a cargo owner", Greer, *L. J.* (1931), 1 K. B. 195, at page 214.

This Court has carried this fundamental principle of public policy to the extent of holding that no provision in the bill of lading should be construed by implication to diminish the obligation of a shipowner to supply a seaworthy ship. *The Caledonia, supra,* and *The Carib Prince, supra.* To give the provision of this bill of lading any such interpretation as that given by the Circuit Court of Appeals, is, we submit, not only in the very teeth of the recognized public policy of our law, as announced by repeated decisions of this Court, but also in the teeth of the fundamental rules of construction repeatedly stated by this Court.

The practical application of the principles upheld by this Court renders impossible the result reached by the court below, viz., that a shipowner, who gives no care to his ships, is offered greater legal protection than a shipowner who uses some but not sufficient effort to fulfill his obligation to make his ship seaworthy. We know of no case where this Court has sanctioned the failure of a shipowner to use due diligence to make his ship seaworthy, and, in the only case which we know of—*International Navigation Co.* v. *Farr,* 181 U. S. 218—where it was contended that the negligence of a sea servant in the loading port in respect of seaworthiness should be dealt with differently from that of a shore servant, this Court emphatically repudiated such a contention. This Court has consistently held that a shipowner must be held to his duty, personally assumed in his contracts, to make his

ship seaworthy up to the time of sending her to sea from the loading port, or at the very least, to see to it that due diligence is used to make her seaworthy.

II. The warranty that the "Galileo" at the time of sailing from the loading port would in fact be seaworthy so far as use of ordinary care could make her seaworthy, and in addition that "the owners" (R. 30A) would "exercise due diligence to make the steamer seaworthy", was a personal contract of the respondent shipowner, for the breach of which it is responsible. The respondent, through its New York managing agent, held itself out in New York, the loading port, as a common carrier under its corporate name, and personally contracted and warranted through such agent that the vessel on sailing would in fact be seaworthy so far as the exercise of ordinary care could make her so.

As this Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, and in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, it is unnecessary on facts such as exist in the present case, where there is a personal promise or warranty, to determine whether or not the respondent's managing agents at Hull or New York personally committed a negligent act independently of any contractual duty or promise, because where such contractual promise or warranty exists, a simple breach of it, or failure to perform, is sufficient to constitute personal failure or fault of the shipowner. In the present case, the respondent personally, through its duly authorized managing agents at New York, promised and warranted in the contracts of affreightment that the "Galileo" would in fact be seaworthy at the time of sailing from the loading port, New York, so far as the exercise of ordinary care could make her so. The mere breach of that personal contract, therefore, constituted neglect of the respondent corporation personally, depriving

it of the benefit of the Limitation Act in 1851, of which the so-called Fire Statute is a section.

In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 149, this Court said:

> "The owners contend that, under §4283 of the Revised Statutes and §18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; *and to such liabilities the limitation acts do not apply.*" (Italics ours.)

In *Pendleton* v. *Benner Line*, 246 U. S. 353, at page 357, this Court said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not."

And in *Richardson* v. *Harmon*, 222 U. S. 96, at page 106, this Court said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

In the light of these decisions, it is obvious that if the contract is a personal contract, there can be no question as to the petitioners' right to recover their damages in full from the respondent. The Circuit Court of Appeals made no finding that these contracts were not personal. Most of the cargo was carried under bills of lading which were issued in the respondent's name by its New York wholly owned subsidiary, as agent in charge of the respondent's business at New York.* The remainder of the cargo was carried under bills of lading not issued in respondent's name but ratified by it by accepting the goods at New York as a connecting common carrier for carriage on the "Galileo" to Europe; and the respondent has furthermore admitted that it authorized the signing and issuance of all the bills of lading (R. 23, 24, 51, 555). Ellerman's Wilson Line, New York, Inc., which signed the first class of bills of lading on behalf of the respondent, was a corporation whose stock was entirely owned by the respondent (R. 343, 347). When the cargo was booked, there was an active correspondence between Ellerman's Wilson Line, New York, Inc. and Ellerman's Wilson Line, Ltd. as to the character of the cargo and the freight to be charged therefor (R. 350 *et seq.*). A good portion of the cargo of the "Galileo" had been booked before she arrived at New York (R. 344). On August 20, 1926, New York had informed Hull of the quantity of cargo it had booked up to that time for Hull, Newcastle and Antwerp (R. 353). On August 28th New York informed Hull by cable of the exact quantity of cargo aboard the "Galileo" at the time the "Galileo" sailed (R. 350). On August 31st New York cabled Hull informing Hull of the exact amount of freight which the vessel would earn for the voyage (R. 350). It is therefore clear that in booking, accepting and issuing bills of lading for

* The record shows that the bills of lading covering the following shipment or item numbers were so issued (R., 50 A): 1, 2, 3, 4, 5, 6, 7, 8, 9, 112, 119, 120, 122, 128, 129, 153, 157, 167, 169, 171, 180, 186, 192, 195, 196, 197, 198, 199, 200, 203, 206, 207, 208, 209, 210, 211, 212, 221, 222, 223, 224, 225, 226, 227, 228, 243, 245, 246.

this cargo, Ellerman's Wilson Line, New York, Inc. was not only acting on express authority previously received from the respondent, but that respondent itself was urging its agent to exercise that authority on its behalf while its agent was booking this very cargo. Therefore, when the bills of lading were signed by Ellerman's Wilson Line, New York, Inc. in the name of the respondent, these contracts became the personal contracts of the respondent.

It has been settled in this country by a long line of decisions that where, as here, a corporation is doing business elsewhere than at the place where its corporate officers reside or have their offices, and has committed or delegated the conduct of its business at that place to an agent, then the knowledge and privity of such agent is that of the corporation personally:

In re Jeremiah Smith & Sons, 193 Fed. 395 (C. C. A. 2);

In re P. Sanford Ross, 204 Fed. 248, 250, 251 (C. C. A. 2);

The Drill Boat No. 4, 233 Fed. 589, 595 (Dis. of Mass.);

The Benjamin Noble, 232 Fed. 382, 397;

The No. 6, 241 Fed. 69, 71 (C. C. A. 2);

Boston Marine Insurance Co. v. *Metropolitan Co.,* 197 Fed. 703 (C. C. A. 9);

Parsons v. *Empire Transportation Co.,* 111 Fed. 202 (C. C. A. 9), certiorari denied 183 U. S. 699;

The Colima, 82 Fed. 665;

Oregon Lumber Co. v. *Portland & Asiatic S. S. Co.,* 162 Fed. 912 (District of Oregon);

Sanbern v. *Wright & Cobb Lighterage Co.,* 171 Fed. 449, affirmed 179 Fed. 1021 (C. C. A. 2).

Consequently, in the present case, as the respondent was doing business in the loading port New York, through its

subsidiary Ellerman's Wilson Line, New York, Inc., in which it owned all the stock, the contracts made by such agent were the contracts of the respondent personally.

With respect to all of the cargo shipped on the "Galileo", as appears from the references to the record given on page 60 of this brief, the respondent knew exactly what cargo the "Galileo" was carrying (R. 349, 350, 351, 353). By letter dated the 19th of August, 1926, addressed by the respondent to its agent in New York, the respondent expressly hoped that the agent at New York would "be able to give her approximately complete homeward cargo" (R. 351), and in the letter dated Hull, August 12, 1926, received by the New York agent August 21, 1926, it was stated: "Grain engagements * * * We hope you will be able to continue booking at certainly not less than 2/6 d" (R. 351). On August 20, 1926, the agent sent to Hull a letter in which they asked the quantity of the "present cargo prospects" (R. 351, 352). On the 3rd of September, 1926, the New York agent addressed to the respondent a letter specifying in detail the exact tonnage and the exact amount of freight covering the entire cargo (R. 350, 351). It, therefore, appears that the booking and actual issuance of contracts of affreightment on the cargo of the "Galileo" was with the full approval and ratification of the respondent at Hull. It is immaterial that certain of the contracts were not physically signed by the respondent. See *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. 11, at page 20, where the court held that it was immaterial that the name of a contractor does not appear in a contract, and that although the name did not appear "it was not by that circumstance any the less a contract of the Mills Transportation Company". The court cited Story on Agency, §160a; Mechem on Agency, §§769, 772; *Higgins* v. *Senior,* 8 Mees. & W. 844; *Ford* v. *Williams,* 21 How. 287 and *Higgins* v. *McCrea,* 116 U. S. 671. See

also *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, at page 336, where this Court said:

> "But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class."

See, also:

Higgins v. *McCrea*, 116 U. S. 671, at page 680.

It has long been settled that all of such contracts are personal to the shipowner. See *McPhail* v. *Williams*, 41 Fed. 61, at page 62, and *Gokey* v. *Fort*, 44 Fed. 364, at page 366.

As was said by Judge Nelson in *McPhail* v. *Williams*, 41 Fed. 61, at page 62:

> "Certainly there was no occasion for Congress to legislate to limit the liability of ship-owners on contracts which they enter into personally, or expressly authorize."

And by Judge Addison Brown in *Gokey* v. *Fort*, 44 Fed. 364, at page 366:

> "It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners 'on account of the ship' does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master, under his general powers in the course of the voyage. *The Amos D. Carver, supra; McPhail* v. *Williams*, 41 Fed. Rep. 61. Such has long been the construction of the broad provisions of the ordinance of Louis XIV, as well as of the similar provisions of section 216 of the Code of Commerce (1 Valin, Comm. 568); Emerigon, Cont. a la Grosse, c. 4, §11; 2 Desjardin, Droit,

Com. Mar. §§283-286; 2 Valroger, Com. du Code de Com. §256. And, in general, repairs made in the home port by the owners, or by their authorized agent, are treated as the personal debts of the owners, and cannot be discharged by a surrender of the vessel. *It is the same with the captain's foreign contracts from the time they are ratified by the owners.* Several of the maritime codes thus expressly provide. See Italian Code Mar. §491; 3 Revue, Internat. du Droit Mar. 316, 318; 4 Revue Internat. du Droit Mar. 337-339; and Desjardin, *ut supra.* Valin says: 'There are cases, however, in which the owner cannot free himself by making this abandonment. * * * The reason is, because these debts are his own personal debts, as much as if he had contracted them himself.' 'It is universally recognized in modern law,' says Desjardin (sec. 283), 'that the right of abandonment cannot be invoked by the owner in order to limit his own personal obligation. The right of abandonment ceases also if the obligation at first contracted by the captain is ratified by the owner; it is the same as if the owner had acted himself (Sec. 284). All legislations that permit the owner to limit his obligation by abandonment disallow this right from the time he has transformed the captain's engagement into his own personal obligation' (sec. 286). In the case of *Norwich Co.* v. *Wright,* 13 Wall. 104, 120, and of *The Scotland,* 105 U. S. 24, 28, 29, Mr. Justice Bradley, in delivering the opinion of the Supreme Court, states that 'the act of Congress seems to have been drawn with reference to these previous laws,' and that 'the rule adopted by Congress is the same as the rule of the general maritime law.' *The City of Norwich,* 118 U. S. 468, 490, 6 Sup. Ct. Rep. 1150. The general purpose of both is the same. The object of both was to encourage ship-building and commerce, and to enable persons having a moderate capital to engage in commerce without becoming liable for an

indefinite amount beyond what was invested in the enterprise, through the faults or contracts of others. This principle becoming, early in the middle ages, a rule of the maritime law, secured, to a considerable extent, for persons engaging in commerce, the same beneficent results that the municipal law adduced by other means; namely, by the formation of corporations, and, more latterly, by associations 'limited,' by which individuals may engage in trade without being liable beyond the amount of invested capital." (Italics ours.)

We showed under Point 1A of this brief that even if the Fire Statute is incorporated in a bill of lading, the duty (and *a fortiori* the personal contract, if one exists) to exercise due diligence to make a ship seaworthy remains unaffected. We have now shown under Point II that when the "Galileo" was permitted to sail in an unseaworthy condition, which was discoverable before sailing, there was a breach of the personal contract entered into in this case. To the liability thus created by the breach of duty or the breach of contract, neither the provisions relating to exoneration from or limitation of liability contained in the Limitation Act of 1851 have any application. Certainly no one reading the clause in the bill of lading as to the shipowner's liability for unseaworthiness would interpret the reference to the Fire Statute in another clause in the bill of lading as a modification of that provision. Nor would the well-settled principles of construction as announced by this Court in *The Caledonia,* 154 Fed. 124 and *The Carib Prince,* 170 U. S. 655, permit such an interpretation.

Conclusion.

The Circuit Court of Appeals took the view that an unqualified acceptance of this Court's language in the *Malcolm Baxter, Jr.* would disturb a "long established con-

struction" of the Act of 1851. We submit that this view is clearly erroneous. Even more clearly mistaken was the assumption of the Circuit Court of Appeals that the petitioners' argument involved a novel construction of the Act of 1851. There may be room for argument as to the precise standard of care which this Court meant to lay down in the *Malcolm Baxter, Jr.*, but we think there can be no doubt that some duty rests upon a shipowner in the matter of making his vessel seaworthy. In a case like the present it is unnecessary to determine the exact standard of care to be applied; for whatever standard is adopted, it is clear that the shipowner in this case failed to comply with it. We have found no case—and certainly none has been cited, where either the courts of the United States or of England have ever held that a shipowner was entitled to exoneration from or limitation of liability under the Act of 1851 (or the similar British statute) in respect of damages resulting from the fact that his vessel was grossly unseaworthy at the time of sailing, when such unseaworthiness was readily observable and had actually been observed by unskilled persons. Under these circumstances, we think it is fair to say that it is not the petitioners but the respondent who seeks to establish a new rule of construction in the present case.

Such a rule of construction as adopted by the Circuit Court of Appeals is a general invitation to shipowners to cease to inspect their vessels and to keep in ignorance of their condition. That any such doctrine will inevitably lead to serious losses, seems clear; for ship's officers are not always thanked for erring on the side of safety as against the side of economy.*

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*In *Fiumana* v. *Bunge*, L. R. (1930), 2 K. B. 47, it is said (at p. 60):

> "The practice of carrying bunker coals on the voyage out and back may always I think involve this risk of fire. * * *
> In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. Indeed, the practice is adopted I imagine from motives of economy."

We cannot believe that this Court will place its approval upon any such doctrine, especially when it involves a departure from previous decisions of this Court.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, and the cause remanded to the District Court with directions to enter a decree awarding petitioners their damages as against the respondent together with interest and costs.

Respectfully submitted,

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APPENDIX A.

U. S. Code, Title 46, Sec. 182 (R. S. 4282, derived from Act of March 3, 1851, c. 43, §1, 9 Stats. at L. 635):

§182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

U. S. Code, Title 46, Sec. 183 (R. S. 4283, derived from Act of March 3, 1851, c. 43, §3, 9 Stats. at L. 635):

§183. LIABILITY OF OWNER NOT TO EXCEED INTEREST. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

U. S. Code, Title 46, Sec. 191 (Section 2 of The Harter Act, Act of Congress, February 13, 1893, c. 105, §2, 27 Stats. at L. 445):

§191. STIPULATIONS RELIEVING FROM EXERCISE OF DUE DILIGENCE IN EQUIPPING VESSELS. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

BRITISH FIRE STATUTE (Section 502, paragraph i, of the British Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60):

The owner of a British seagoing ship, or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

U. S. Code, Title 46, Section 181 (Section 4281 R. S.):

"If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered."

U. S. Code, Title 46, Section 187 (Section 4287 R. S.):

"Nothing in the five preceding sections (R. S. 4282-4286) shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or seamen for or on account of any embezzlement, injury, loss, or destruction of merchandise or property

put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

APPENDIX B.

Pertinent clauses in the forms of bills of lading covering most of the cargo in this case (R. 30 A, 50 A):

"IT IS MUTUALLY AGREED that the steamer shall have liberty to sail with or without pilots; to tow and assist vessels in distress; that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; and, in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage to transship the goods to their destination by any other steamer; that the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after or during or while waiting loading, transshipment, discharge, delivery or other disposition of goods, or on board, or in lighters or craft, or on wharf or in warehouse, at any port or place, occasioned by any of the following excepted causes, throughout this contract always excepted; By perils of the sea or other waters, by fire or flood, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; theft or pilferage on board, in craft, or on shore; by arrest or restraint of princes, rulers or people, riots, strikes, lock-out, stoppage of labor, labor disputes or labor disturbances of any kind, or by any reasonable course of action adopted by the Shipowner or other person whomsoever in contemplation or consequence thereof or in connection therewith; by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy;

by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, chafage, vermin, or by explosion of any goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, the insufficiency of packages, or from the carriage of livestock and/or cargo on deck; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, addresses or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value. General average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees, or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but, with the shipowner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness. It is further agreed that, in addition to the liability of any other person as owner of the goods, the shipper shall be liable for all contributions in general average and special charges payable in respect of the goods, whether or not he be liable therefor as owner of the goods.

IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc. and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

[See also pp. 8, 9 and 49, 50 of this brief.]